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No. 07-1015

# In the Supreme Court of the United States

JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, AND ROBERT MUELLER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, PETITIONERS

*v.*

JAVAID IQBAL, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE PETITIONERS

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## QUESTIONS PRESENTED

1. Whether a conclusory allegation that a Cabinet-level officer or other high-ranking official knew of, condoned, or agreed to subject a plaintiff to allegedly unconstitutional acts purportedly committed by subordinate officials is sufficient to state individual-capacity claims against those officials under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

2. Whether a Cabinet-level officer or other high-ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high-level supervisors, they had constructive notice of the discrimination allegedly carried out by such subordinate officials.

## PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, the following six individuals were parties in the court of appeals. Each of them was a defendant in the district court and an appellant in the court of appeals:

Dennis Hasty, former Warden of the Metropolitan Detention Center; Michael Cooksey, former Assistant Director for Correctional Programs of the Bureau of Prisons; David Rardin, former Director of the Northeast Region of the Bureau of Prisons; Michael Rolince, former Chief of the Federal Bureau of Investigation's International Terrorism Operations Section, Counterterrorism Division; Kathleen Hawk Sawyer, former Director of the Federal Bureau of Prisons; Kenneth Maxwell, former Assistant Special Agent in Charge, New York Field Office, Federal Bureau of Investigation.

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## BRIEF FOR THE PETITIONERS

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-70a) is reported at 490 F.3d 143. The memorandum and order of the district court dismissing some, but not all, of the claims against petitioners (Pet. App. 71a-150a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on June 14, 2007. Petitions for rehearing were denied on September 18, 2007 (Pet. App. 151a-152a). On December 7, 2007, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and in-

cluding January 16, 2008. On January 4, 2008, Justice Ginsburg further extended the time to February 6, 2008, and the petition was filed on that date. The petition for a writ of certiorari was granted on June 16, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

**STATEMENT**

1. Immediately after the attacks of September 11, 2001, the Federal Bureau of Investigation (FBI) and other parts of the United States Department of Justice launched an investigation of unprecedented size to identify those involved in the attacks and to disrupt any follow-on attacks. "Within 3 days, more than 4,000 FBI Special Agents and 3,000 support personnel were assigned to work on the investigation," and "[b]y September 18, 2001, the FBI had received more than 96,000 leads from the public." Pet. App. 76a n.4.

In the first two months of the investigation, the FBI questioned more than one thousand people suspected of having some link specifically to the September 11 attacks or generally to terrorism. See Office of the Inspector General, U.S. Department of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks*, at 1 (Apr. 2003) <http://www.usdoj.gov/oig/special/0306/full.pdf> (*OIG Report*).[1] Many of those were released without any charge, but 762 individuals were held on immigration charges. *Id.* at 2, 15. A subset of 184 mem-

[1] The district court's opinion resolving motions to dismiss cited the *OIG Report*, a public document. See Pet. App. 76a n.4, 77a n.5, 114a, 116a & n.20. Much of the report (specifically, the preliminary pages and pages 1-26, 37-71, and 111-164) was included in the joint appendix in the court of appeals. See C.A. App. 128-249.

bers of that group were deemed to be "of high interest" to the terrorism investigation. *Id*. at 111. Those "high interest" detainees were housed in Bureau of Prison facilities under protective conditions aimed at preventing them from communicating with any co-conspirators who might still be at large. *Id*. at 19, 25. The remainder were deemed to be "of interest" to the investigation and held in less-restrictive conditions. *Id*. at 25.

2. Respondent Iqbal is a Pakistani citizen who was arrested by federal officials in New York City in November 2001 and detained at the Metropolitan Detention Center (MDC) in Brooklyn pending trial on charges of conspiracy to defraud the United States and fraud in relation to identification documents. Pet. App. 2a-4a & n.1.[2] He does not challenge his arrest. For part of the time he was detained at the MDC (between January and July 2002), he was, like others deemed to be "of high interest" to the September 11 investigation, not housed with the general prison population but held in restrictive conditions in the Administrative Maximum Special Housing Unit (ADMAX SHU). *Id.* at 4a, 73a. Respondent ultimately pleaded guilty to the criminal charges against him and, after the period at issue in this lawsuit, was sentenced to a 16-month term of imprisonment and later removed to Pakistan. *Id*. at 7a, 73a n.1.

After his release and removal to Pakistan, respondent sued 34 current and former federal officials, 19 "John Doe" federal correction officers, and the United States, asserting in most of his claims that he was badly mistreated by prison employees during his detention. Pet. App. 7a n.3, 87a-91a (summarizing claims against

[2] Although other defendants-appellants in the court of appeals are also respondents in this Court by virtue of Supreme Court Rule 12.6, references in this brief to "respondent" are to Iqbal.

each defendant); *id.* at 157a-163a (Compl. ¶¶ 10-45) (identifying defendants). The defendants range from the individual prison officials who allegedly had contact with respondent, to the wardens of the facility where respondent was held, all the way up the chain of command to the petitioners here: the Director of the FBI and a former Attorney General of the United States.

The bulk of the allegations are focused on the asserted acts of the lower-level prison employees who had direct contact with respondent. Respondent does not specifically tie those acts to petitioners. Instead, he alleges, in relevant part, that petitioners are responsible (along with others) for the decision, made by lower-level officials two months after his arrest, to detain him under highly restrictive conditions of confinement as someone "of high interest" to the September 11 investigation. He claims that decision reflected unlawful racial and religious discrimination, for which petitioners (and others) are personally liable under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and as co-conspirators under 42 U.S.C. 1985(3).[3] He seeks compensatory and punitive damages, as well as attorney's fees and costs. Pet. App. 202a-203a, 207a, 209a, 214a (Compl. ¶¶ 233, 236, 248, 251; prayer for relief).

To support his claim of unlawful discrimination, respondent alleges that, "[i]n many cases," detainees were classified as being "of high interest" because of their race, religion, or national origin instead of "any evidence

[3] Respondent's remaining claims against petitioners were dismissed on other grounds, and are not at issue in this appeal. A separate suit also arising out of the treatment of September 11 detainees is pending before the Second Circuit and raises issues not presented here. See *Turkmen* v. *Ashcroft*, No. 06-3745-cv (2d Cir. argued Feb. 14, 2008).

of the detainees' involvement in supporting terrorist activity." Pet. App. 164a (Compl. ¶¶ 48-49). Moreover, according to respondent, "within the New York area, all Arab Muslim men arrested on criminal or immigration charges while the FBI was following an investigative lead into the September 11th attacks—however unrelated the arrestee was to the investigation—were immediately classified as 'of interest' to the post-September-11th investigation." *Id.* at 165a (Compl. ¶ 52).

In attempting to tie petitioners to those allegedly unconstitutional practices, respondent claims that they approved a policy of detaining suspects determined to be "of high interest" to the investigation into the September 11 attacks "in highly restrictive conditions of confinement until they were 'cleared' by the FBI." Pet. App. 168a (Compl. ¶ 69). He specifically alleges that two lower-level FBI officials were actually responsible for implementing that policy, and that they selected him as a "high interest" suspect on the basis of discriminatory criteria. See *id.* at 164a-165a (Compl. ¶ 51) (alleging that respondent was selected by defendants Rolince and/or Maxwell as a "high interest" suspect because of his race, religion, or national origin); *id.* at 169a (Compl. ¶ 76) (alleging that defendants Rolince and Maxwell refused to clear detainees for release to the general population "based simply on the detainees' race, religion, and national origin"). He does not, however, allege that petitioners engaged in any such conduct.

Instead, respondent asserts that, as Attorney General, petitioner Ashcroft had "ultimate responsibility for the implementation and enforcement of the immigration and federal criminal laws" and was "a principal architect of the policies and practices challenged here." Pet. App. 157a (Compl. ¶ 10). He alleges that, as Director of the

FBI, petitioner Mueller "was instrumental in the adoption, promulgation, and implementation of the policies and practices challenged here," *ibid.* (Compl. ¶ 11), and that the FBI, "under the direction of [petitioner] Mueller, arrested and detained thousands of Arab Muslim men" in the course of investigating the September 11 attacks, *id.* at 164a (Compl. ¶ 47). Finally, he alleges that petitioners Ashcroft and Mueller (among others) "knew of, condoned, and willfully and maliciously agreed to subject [him] to these conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." *Id.* at 172a-173a (Compl. ¶ 96).

3. Petitioners (and other defendants) moved to dismiss the claims against them on the ground that, *inter alia*, they are entitled to qualified immunity. In relevant part, the district court refused to dismiss the *Bivens* and conspiracy claims against petitioners. Pet. App. 133a-137a, 142a-146a, 150a. The court ruled that allegations that respondent was confined in significantly harsher conditions solely because of his race and religion were sufficient to state a violation of clearly established law, and that he had adequately alleged personal involvement by petitioners in the adoption of the allegedly discriminatory policy regarding detainees "of high interest." *Id.* at 133a-137a, 142a-146a.

The district court acknowledged that personal involvement was "a closer question" for the several defendants (including petitioners) who were higher in the chain of command than the wardens of the MDC. Pet. App. 116a. Indeed, the district court noted that the "assertion that high-level executive branch members created an unconstitutional policy, without more, would be insufficient to state a claim." *Ibid.* Nevertheless, it con-

cluded that the "unique context" of the September 11 investigation supported respondent's "assertions that [petitioners] were involved in creating and/or implementing the detention policy under which [respondent was] confined." *Id.* at 116a, 146a. The district court thus found, with respect to each of the relevant counts, that it was unable to conclude that there was "no set of facts" on which respondent would be entitled to relief from petitioners. *Id.* at 135a-137a, 146a.

4. a. The court of appeals affirmed in relevant part. Pet. App. 1a-70a. It focused on "several issues concerning the defense of qualified immunity in the aftermath of the events of 9/11." *Id.* at 2a. The court of appeals acknowledged that, as supervisory officials, petitioners could be held responsible only to the extent they had "personal involvement" in the unconstitutional acts of their subordinates. *Id.* at 14a. Relying on circuit precedent involving 42 U.S.C. 1983, however, it held that:

> The personal involvement of a supervisor may be established by showing that he (1) directly participated in the violation, (2) failed to remedy the violation after being informed of it by report or appeal, (3) created a policy or custom under which the violation occurred, (4) was grossly negligent in supervising subordinates who committed the violation, or (5) was deliberately indifferent to the rights of others by failing to act on information that constitutional rights were being violated.

Pet. App. 14a.

In addressing the pleading requirements for such a claim, the court of appeals observed that this Court's decisions in this area are "not readily harmonized." Pet. App. 15a; see *id.* at 15a-27a (discussing *Leatherman* v.

*Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993); *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506 (2002); *Crawford-El* v. *Britton*, 523 U.S. 574 (1998); and *Bell Atl. Corp.* v. *Twombly*, 127 S. Ct. 1955 (2007)). The court of appeals then interpreted those decisions, including the recent decision in *Bell Atlantic*, as requiring "a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*." *Id.* at 25a.

The court of appeals saw "some merit" in the view that a more rigorous standard should be applied where a defendant asserts qualified immunity. Pet. App. 25a. It recognized that "qualified immunity is a privilege that is essential to the ability of government officials to carry out their public roles effectively without fear of undue harassment by litigation." *Ibid.* Here, in particular, the court found that "some of [respondent's] claims are based *not on facts* supporting the claim *but, rather, on generalized allegations* of supervisory involvement," and it conceded that allowing such claims to proceed "might facilitate the very type of broad-ranging discovery and litigation burdens that the qualified immunity privilege was intended to prevent." *Ibid.* (emphases added). Nevertheless, the court of appeals believed it was bound to apply the more "flexible 'plausibility standard'" it described. *Ibid.*; see *id.* at 25a-26a.

Applying its standard for "personal involvement" of supervisory officials and its "plausibility standard" to claims against petitioners, the court of appeals held that respondent had sufficiently pleaded valid claims against petitioners for racial and religious discrimination under *Bivens* and for conspiracy to violate his civil rights. Pet. App. 62a-63a, 65a. The court concluded that the allega-

tions that respondent was deemed to be "of high interest" to the September 11 investigation solely because of his race and religion were sufficient to make out claims of unlawful discrimination against petitioners. *Id.* at 59a. Relying on *Crawford-El* and *Swierkiewicz* as well as prior circuit precedent, the court held that such conclusory allegations of discriminatory motive were sufficient to survive a motion to dismiss. *Id.* at 61a. In particular, the court pointed to respondent's allegation that all Arab Muslim men arrested on criminal or immigration charges in the New York region in the course of the FBI's investigation into the September 11 attacks were initially classified as being "of interest." *Ibid.*

The court of appeals also held that the allegations against petitioners were sufficient to establish their personal involvement in or responsibility for the alleged discriminatory conduct. Pet. App. 62a. In reaching that conclusion, the court cited respondent's allegations that they "were instrumental in adopting the 'policies and practices challenged,'" that thousands of Arab Muslims were arrested by the FBI "under the direction of [petitioner] Mueller," and that petitioners Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed to subject [respondent] to these conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." *Ibid.*

Although the court acknowledged that respondent alleged that officials other than petitioners had selected respondent as a "high interest" detainee, it concluded that "does not necessarily insulate [petitioners] from personal responsibility for the actions of their subordinates under the standards of supervisory liability" in the Second Circuit. Pet. App. 62a. In particular, the court

concluded that there was no need to allege "subsidiary facts" in these circumstances "because of the likelihood that these senior officials would have concerned themselves with the formulation and implementation of policies dealing with the confinement of those arrested on federal charges in the New York City area and designated 'of high interest' in the aftermath of 9/11." *Ibid.*

b. Judge Cabranes joined the court of appeals' opinion, but filed a separate concurrence to "underscor[e] that some of [this Court's] precedents are less than crystal clear" in this area. Pet. App. 68a. In addition, he highlighted the "uneasy compromise" that the court struck between a qualified-immunity doctrine properly "rooted in the need to preserve the 'effectiveness of government as contemplated by our constitutional structure'" and this Court's interpretation of general civil pleading requirements. *Ibid.* (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 820 n.35 (1982)). Judge Cabranes expressed concern that the result could undermine the "important policy interest" of "'enabling Cabinet officers with responsibilities in [the national security] area to perform their sensitive duties with decisiveness and without potentially ruinous hesitation.'" *Id.* at 70a (quoting *Mitchell* v. *Forsyth*, 472 U.S. 511, 541 (1985) (Stevens, J., concurring in the judgment)).

In particular, Judge Cabranes explained that, even though most of the conduct respondent complains about is alleged to have been carried out by lower-level officials, "it is possible that the incumbent Director of the Federal Bureau of Investigation and a former Attorney General of the United States will have to submit to discovery, and possibly to a jury trial, regarding [respondent's] claims." Pet. App. 69a. Judge Cabranes also emphasized that concerns about discovery abuse are "all

the more significant in the context of a lawsuit against * * * federal government officials charged with responsibility for national security and entitled by law to assert claims of qualified immunity." *Ibid.* Furthermore, Judge Cabranes expressed concern that "little would prevent other plaintiffs claiming to be aggrieved by national security programs and policies of the federal government from following the blueprint laid out by this lawsuit to require officials charged with protecting our nation from future attacks to submit to prolonged and vexatious discovery processes." *Id.* at 69a-70a.

## SUMMARY OF ARGUMENT

The court of appeals erred in concluding that the former Attorney General and Director of the FBI may be subjected to the demands of discovery and potentially a trial based on the highly generalized and speculative allegations made by respondent concerning their involvement in the wrongs allegedly committed by others.

I. It is well settled that government officials such as petitioners are entitled to qualified immunity from damages suits in their personal capacity, because such immunity aids "the effective functioning of government." *Scheuer* v. *Rhodes*, 416 U.S. 232, 242 (1974). "[T]here is a strong public interest in protecting public officials from the costs associated with the defense of damages actions," *Crawford-El* v. *Britton*, 523 U.S. 574, 590 (1998), because such lawsuits inevitably "diver[t] * * * official energy from pressing public issues," *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982), and risk deterring officials' "willingness to execute [their] office with the decisiveness and the judgment required by the public good." *Scheuer*, 416 U.S. at 240. Those concerns are especially pronounced in "matters of national security

and foreign policy" and with respect to Cabinet-level and other high-ranking officials, such as petitioners, who are "easily identifiable target[s] for suits for civil damages." *Mitchell* v. *Forsyth*, 472 U.S. 511, 541-542 (1985) (Stevens, J., concurring in the judgment) (quoting *Nixon* v. *Fitzgerald*, 457 U.S. 731, 753 (1982)).

Recognizing that overly permissive pleading standards can be inconsistent with the purposes of qualified immunity, the Court has countenanced a "firm application of the Federal Rules of Civil Procedure" in the qualified-immunity context, *Butz* v. *Economou*, 438 U.S. 478, 508 (1978), and instructed district courts to "insist" that a plaintiff "'put forward specific, nonconclusory factual allegations' that establish * * * cognizable injury" before allowing a suit "to survive a prediscovery motion for dismissal or summary judgment," *Crawford-El*, 523 U.S. at 598 (quoting *Siegert* v. *Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in the judgment)). And, even outside the sensitive qualified-immunity context, the Court has stressed that general federal pleading standards should be firmly applied, and that a complaint must allege sufficient facts to cross "the line between possibility and plausibility." *Bell Atlantic Corp.* v. *Twombly*, 127 S. Ct. 1955, 1966 (2007).

This Court has emphasized that qualified-immunity claims must be analyzed in light of "the specific context of the case," *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001), and context likewise bears on the showing necessary to satisfy the established pleading standards. Because of the nature of their positions, it is less likely as a general matter that high-ranking officials will be personally involved in wrongdoing allegedly committed by officials far down the bureaucratic chain of command. As a general matter, therefore, it will be more difficult for a

plaintiff to establish a plausible entitlement to relief against high-ranking officials under the established pleading standards. Importantly, in attempting to make such a showing, it is not sufficient for a plaintiff to show that the personal involvement of a high-ranking official in alleged wrongdoing by a lower-level official was among the realm of *possibilities*; rather, to survive a motion to dismiss, a plaintiff must plead facts sufficient to render the personal involvement and liability of such a high-ranking official plausible.

This case arises from the government's response to an unprecedented national-security crisis and, as pertinent here, involves claims against a former Attorney General and the current Director of the FBI. During the relevant time period, those officials were deluged with official demands and, among other things, headed the largest investigation in American history, involving thousands of law-enforcement agents. Applying the pleading standards established by this Court in light of the specific context of this case, respondent's conclusory allegations with respect to petitioners are inadequate to make the alleged grounds of wrongdoing clear and plausibly to suggest that petitioners themselves were personally involved in the alleged unlawful conduct of lower-level officials or otherwise violated clearly established law. Petitioners are therefore entitled to qualified immunity from respondent's suit.

II. The court of appeals also erred by relying upon the broad standards for supervisory liability that it has developed in the context of claims against state and local officials under 42 U.S.C. 1983. Although *Bivens* inferred the availability of a damages remedy against federal officials for certain violations of the Constitution, this Court has been wary of expanding the scope of that rem-

edy. See, *e.g.*, *Wilkie* v. *Robbins*, 127 S. Ct. 2588, 2597 (2007). It has explained that *Bivens* "is solely concerned with deterring the unconstitutional acts of individual officers" and not with "deterring the conduct of a policy-making entity," *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 71 (2001), and it has thus refused to extend the remedy to suits against anyone other than the individual officers responsible for the alleged constitutional violation. See, *e.g.*, *FDIC* v. *Meyer*, 510 U.S. 471 (1994). The logic of those cases similarly requires that high-level federal officials may be held liable only for their direct involvement in constitutional violations, or at least their deliberate indifference in the face of information that the rights of others are being violated.

That understanding is consistent with the long-standing principle that a government official may be held liable only for his own culpable actions, and not under a theory of *respondeat superior* or vicarious liability. See *Dunlop* v. *Munroe*, 11 U.S. (7 Cranch) 242, 269 (1812); see also *Robertson* v. *Sichel*, 127 U.S. 507, 515-516 (1888). Likewise, it ensures that supervisory liability under *Bivens* is not *broader* than it is in analogous circumstances under Section 1983, where this Court has foreclosed the imposition of liability on individual government officials on the basis that they had constructive notice of wrongdoing committed by third parties (including their subordinates). See, *e.g.*, *Rizzo* v. *Goode*, 423 U.S. 362 (1976); *Board of the County Comm'rs* v. *Brown*, 520 U.S. 397, 404 (1997).

Because respondent's complaint is focused on the alleged actions of lower-level officials, and respondent has failed adequately to allege anything other than constructive notice on the part of petitioners, the court of

appeals improperly expanded *Bivens* in permitting this action to proceed against petitioners.

## ARGUMENT

### I. RESPONDENT HAS FAILED TO ALLEGE FACTS SUFFICIENT TO OVERCOME PETITIONERS' DEFENSE OF QUALIFIED IMMUNITY

This Court has established several principles that govern the resolution of this case. First, district courts should engage in a "firm application" of the Federal Rules of Civil Procedure in considering motions to dismiss on the ground of qualified immunity. *Butz* v. *Economou*, 438 U.S. 478, 508 (1978). Second, qualified-immunity claims should be resolved "at the earliest possible stage of litigation" to give effect to the policies underlying the qualified-immunity doctrine. *Hunter* v. *Bryant*, 502 U.S. 224, 227 (1991) (per curiam). Third, district courts should "insist" that a plaintiff "'put forward specific, nonconclusory factual allegations' that establish * * * cognizable injury" before allowing a suit "to survive a prediscovery motion for dismissal or summary judgment." *Crawford-El* v. *Britton*, 523 U.S. 574, 598 (1998). And fourth, to survive a motion to dismiss, a complaint must allege sufficient facts to cross "the line between possibility and plausibility." *Bell Atlantic Corp.* v. *Twombly*, 127 S. Ct. 1955, 1966 (2007). Under those settled principles, the court of appeals erred in permitting this suit to proceed against petitioners.

### A. As This Court Has Recognized, A Firm Application Of Pleading Standards Is Necessary To Vindicate The Purposes Served By Qualified Immunity

#### *1. The qualified-immunity doctrine serves vital public interests*

As this Court has observed, "there is a strong public interest in protecting public officials from the costs associated with the defense of damages actions." *Crawford-El*, 523 U.S. at 590. A government official's immunity from suit is not "a badge or emolument of exalted office," but is instead firmly grounded upon principles of public policy—"a policy designed to aid in the effective functioning of government." *Scheuer* v. *Rhodes*, 416 U.S. 232, 242 (1974) (quoting *Barr* v. *Matteo*, 360 U.S. 564, 572-573 (1959)). The defense of qualified immunity thus prevents "the diversion of official energy from pressing public issues," *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982), and preserves an official's "willingness to execute his office with the decisiveness and the judgment required by the public good," *Scheuer*, 416 U.S. at 239-240. It also ensures that able candidates for government office are not deterred from entering public service by the threat of damages suits. See *Wyatt* v. *Cole*, 504 U.S. 158, 167 (1992); *Harlow*, 457 U.S. at 814. As Judge Learned Hand observed long ago, to deny such immunity would "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950). Accordingly, qualified immunity serves the larger purpose of "safeguard[ing] government," not just "benefit[ing] its agents." *Wyatt*, 504 U.S. at 168.

Of course, the immunity of most officials is qualified, rather than absolute, to ensure there is adequate deterrence of official action that runs afoul of clearly established constitutional or statutory limits. See *Harlow*, 457 U.S. at 819. But, as the Court has explained, "the importance of a damages remedy to protect the rights of citizens" must always be balanced against "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Id.* at 807 (quoting *Butz*, 438 U.S. at 506).

The qualified-immunity defense granted to government officials is intended to "spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Siegert* v. *Gilley*, 500 U.S. 226, 232 (1991); see also *Wyatt*, 504 U.S. at 165-169. It has thus been appropriately characterized as "an *immunity from suit* rather than a mere defense to liability." *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985). In other words, "the defense is meant to give government officials a right, not merely to avoid 'standing trial,' but also to avoid the burdens of 'such *pretrial* matters as discovery . . . , as [i]nquiries of this kind can be peculiarly disruptive of effective government.'" *Behrens* v. *Pelletier*, 516 U.S. 299, 308 (1996) (quoting *Mitchell*, 472 U.S. at 526) (alteration in original; some internal quotation marks omitted).

This Court has therefore "repeatedly * * * stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter* v. *Bryant*, 502 U.S. 224, 227 (1991) (per curiam). It is the responsibility of the district court "expeditiously to weed out suits * * * without requiring a defendant who rightly claims qualified immunity to engage in ex-

pensive and time consuming preparation to defend the suit on its merits." *Siegert*, 500 U.S. at 232-233; see also *Harlow*, 457 U.S. at 818 (until the "threshold immunity question is resolved, discovery should not be allowed").

The concerns underlying the qualified-immunity doctrine are at their height in suits, such as this, targeting high-ranking officials in matters involving national security. As Justice Stevens has explained, "[t]he passions aroused by matters of national security and foreign policy and the high profile of the Cabinet officers with functions in that area make them 'easily identifiable target[s] for suits for civil damages.'" *Mitchell*, 472 U.S. at 541-542 (Stevens, J., concurring in the judgment) (footnote omitted). Moreover, faced with the threat of such suits, "[p]ersons of wisdom and honor will hesitate to answer the President's call to serve in these vital positions" for "fear that vexatious and politically motivated litigation associated with their public decisions will squander their time and reputation, and sap their personal financial resources when they leave office." *Id.* at 542. Or even worse, persons who accept such positions will perform their critically important duties with "potentially ruinous hesitation." *Id.* at 541.

Accordingly, this Court has recognized that "high officials require greater protection than those with less complex discretionary responsibilities." *Harlow*, 457 U.S. at 807. The "substantial social costs" of permitting suit, "including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties," *Anderson* v. *Creighton*, 483 U.S. 635, 638 (1987), are more pronounced in the case of officials who have broad policy-making duties. Indeed, when this Court denied certain federal officials *absolute* immunity from suit, it stressed

that "plaintiffs may not play dog in the manger" and predicted—as it turned out somewhat optimistically—that "firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits." *Butz*, 438 U.S. at 508.

These concerns are directly implicated by this case. The court of appeals' decision subjects a former Attorney General of the United States and the Director of the FBI to the demands of further litigation, including discovery, based on a conclusory allegation that they "knew of" or "condoned" (Pet. App. 172a-173a (¶ 96)) actions allegedly taken by lower-level officials in the context of the largest investigation ever conducted in the history of the Nation, in the wake of the deadliest foreign attack on American soil. In the aftermath of any future national-security crisis, the last thing that the Nation should fear is that its leaders will act with "potentially ruinous hesitation," *Mitchell*, 472 U.S. at 541 (Stevens, J., concurring in the judgment), because of concerns—based on *Bivens* litigation such as this—that they may be subjected to the burdens of personal-capacity litigation based on bare allegations that they "knew of" or "condoned" actions allegedly taken by one or more of the potentially thousands of officers involved in the government's response to that crisis.

***2. Proper application of pleading standards is critical to giving effect to the qualified-immunity doctrine***

The fundamental policies served by qualified immunity are undermined by an unduly permissive application of general civil pleading standards, like the one employed by the court of appeals here. An overly permissive approach permits a plaintiff to thwart immunity by making conclusory and non-specific allegations of official

wrongdoing, thus preventing the court from making an early determination whether qualified immunity is warranted. See *Siegert*, 500 U.S. at 232. Those problems are particularly acute in the case of high-ranking officials such as the Attorney General and the Director of the FBI, because if they can be subjected to the demands of litigation based solely on the sort of conclusory allegations at issue here, then, as Judge Cabranes recognized, they could be added to virtually any complaint challenging the alleged actions of lower-level officers "following the blueprint laid out by this lawsuit." Pet. App. 70a (concurring opinion).

Where, as here, an unconstitutional motive is an element of the alleged illegality, a lax pleading standard also makes it all-too-easy for plaintiffs to impose unwarranted burdens on government officials. This Court has explained that such cases present a "potentially serious problem" because "an official's state of mind is easy to allege and hard to disprove, [and] insubstantial claims that turn on improper intent may be less amenable to summary disposition than other types of claims against government officials." *Crawford-El*, 523 U.S. at 584-585 (internal quotation marks omitted). Subjecting officials to the threat of suit whenever their proper and lawful actions could be misconstrued as being improperly motivated—or merely *alleged* to have been tainted by an improper motive—almost certainly will affect their "willingness to execute [their] office[s] with the decisiveness and the judgment required by the public good." *Scheuer*, 416 U.S. at 240. Such lawsuits, therefore, raise the same policy concerns that forced this Court to "completely reformulate[] qualified immunity" by adopting an objective rather than subjective standard. *Anderson*, 483 U.S. at 645; see also *Wyatt*, 504 U.S. at 170-171

(Kennedy, J., concurring) ("The transformation was justified by the special policy concerns arising from public officials' exposure to repeated suits.").

This Court has previously recognized that motive-based claims "implicate[] obvious concerns with the social costs of subjecting public officials to discovery and trial, as well as liability for damages." *Crawford-El*, 523 U.S. at 584-585. And to address those concerns, the Court has admonished that trial courts should "insist that the plaintiff 'put forward *specific, nonconclusory* factual allegations' that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment." *Id.* at 598 (quoting *Siegert*, 500 U.S. at 236 (Kennedy, J., concurring in the judgment)) (emphasis added). That requirement is critical to promoting the policies underlying the qualified-immunity doctrine and squares with a proper understanding of the general pleading standards established by the Federal Rules of Civil Procedure.

### B. *Bell Atlantic* Clarified The General Civil Pleading Standards Governing Federal Claims, Including Those Implicating Qualified Immunity

A proper application of the general federal pleading standards is also critical to ensuring that this Court's qualified-immunity decisions are respected.

1. Despite this Court's teachings, the lower courts have struggled with what Judge Cabranes called the "uneasy compromise" (Pet. App. 68a) between protecting the substance of the qualified-immunity doctrine and applying liberal pleading standards. See, *e.g.*, *Thomas* v. *Independence Twp.*, 463 F.3d 285, 299 (3d Cir. 2006) (discussing "the incompatibility between the concept of notice pleading and the qualified immunity doctrine, and

the resulting quandary faced by defendants"); *Jacobs* v. *City of Chicago*, 215 F.3d 758, 765 n.3 (7th Cir. 2000) (noting the "tension in this area"); *Schultea* v. *Wood*, 47 F.3d 1427, 1433 (5th Cir. 1995) (en banc) ("The contention that a federal procedural rule conflicts with a substantive right is problematic."); cf. *Siegert*, 500 U.S. at 236 (Kennedy, J., concurring in the judgment) (concluding that a departure from the normal pleading rule would be justified because "[t]he substantive defense of immunity controls"). That effort was made particularly difficult by the long-standing axiom that a complaint may not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957).

*Conley*'s "no set of facts" language had led some courts to permit even thinly pleaded complaints against government officials to survive motions to dismiss, despite this Court's repeated admonition to resolve qualified-immunity issues as expeditiously and early in a case as possible. See, *e.g.*, *Robbins* v. *Oklahoma*, 519 F.3d 1242, 1246 (10th Cir. 2008) (noting that under *Conley*, "a complaint was immune from dismissal if it left open the possibility that a fact not alleged in the complaint could render the complaint sufficient"); *Alvarado* v. *Litscher*, 267 F.3d 648, 651-652 (7th Cir. 2001) ("Because an immunity defense usually depends on the facts of the case, dismissal at the pleading stage is inappropriate: [T]he plaintiff is not required initially to plead factual allegations that anticipate and overcome a defense of qualified immunity.") (brackets in original). The district court in this case—which specifically invoked the "no set of facts" language, Pet. App. 96a, 135a-137a, 146a—committed precisely that error.

2. In *Bell Atlantic Corp.* v. *Twombly*, 127 S. Ct. 1955 (2007), this Court disavowed *Conley*'s statement that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," 355 U.S. at 45-46, declaring unequivocally that, "this famous observation has earned its retirement," *Bell Atl. Corp.*, 127 S. Ct. at 1969. At the same time, the Court clarified that Federal Rule of Civil Procedure 8(a) establishes a "plausibility" threshold: "The need at the pleading stage for allegations *plausibly suggesting* (not merely consistent with) [actionable conduct] reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to '*sho[w]* that the pleader is entitled to relief.'" *Bell Atl. Corp.*, 127 S. Ct. at 1966 (emphases added).

The Court further explained that, "to enter the realm of plausible liability," a complaint must cross two hurdles. *Bell Atl. Corp.*, 127 S. Ct. at 1966 n.5. First, a plaintiff's allegations must cross "the line between the conclusory and the factual." *Ibid.* As the Court emphasized, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1964-1965 (citing *Papasan* v. *Allain*, 478 U.S. 265, 286 (1986)). Instead, the complaint must contain sufficient "factual matter" to "raise a right to relief above the speculative level" and to "raise a reasonable expectation that discovery will reveal evidence of" illegal activity. *Id.* at 1965.

Second, a plaintiff's factual allegations must also do more than create a *suspicion* of actionable wrongdoing: "[F]actually neutral" allegations—*i.e.*, allegations that are consistent with lawful behavior—are inadequate to

defeat a motion to dismiss. *Bell Atl. Corp.*, 127 S. Ct. at 1966 n.5. Instead, a complaint must make "factually suggestive" allegations from which a reasonable inference of illegal conduct may be drawn. *Id.* at 1965-1966 & n.5.

For instance, the plaintiffs in *Bell Atlantic* claimed that a number of companies had engaged in an antitrust conspiracy in violation of Section 1 of the Sherman Act based entirely on factual allegations describing parallel business conduct. Because, "in light of common economic experience," those facts were just as easily explained by legitimate conduct, the Court held that plaintiffs' factual allegations were insufficient to state a valid Section 1 claim. See *id.* at 1971-1973; see also *id.* at 1971 ("[I]f alleging parallel decisions to resist competition were enough to imply an antitrust conspiracy, pleading a [Section] 1 violation against almost any group of competing business would be a sure thing."). Absent specific factual allegations that were suggestive of illegal conduct (rather than "factually neutral allegations"), the Court explained, it would be "hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests." *Id.* at 1965 n.3.

The Court in *Bell Atlantic* also specifically rejected the suggestion that "a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through 'careful case management,'" noting that "the success of judicial supervision in checking discovery abuse has been on the modest side." 127 S. Ct. at 1967. It concluded that the only way "to avoid the potentially enormous expense of discovery in cases with no 'reasonably founded hope that the [discovery] process will reveal relevant evidence'" is to "tak[e] care to require allegations that reach the

level suggesting" illegal conduct. *Ibid.* (quoting *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 347 (2005)) (brackets in original). The theoretical possibility of prescribing "phased" or "limited" discovery cannot serve as an adequate safeguard, because "the hope of effective judicial supervision is slim." *Id.* at 1968 n.6.

Finally, in concluding that the plaintiffs in *Bell Atlantic* had failed adequately to plead illegal conduct under a proper understanding of the Federal Rules of Civil Procedure, the Court rejected the suggestion that it had adopted a "'heightened' pleading standard." *Bell Atlantic Corp.*, 127 S. Ct. at 1973 n.14. Rather, the Court explained, it had simply concluded that "the complaint warranted dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible." *Ibid.*

3. *Bell Atlantic* was decided after this case was briefed and argued, but before the court of appeals handed down its decision. The court of appeals recognized and attempted to apply *Bell Atlantic* in its decision. See Pet. App. 19a-25a. But it believed that *Bell Atlantic* had sent "conflicting signals" on the pleading standards it applied and had simply "created" more "uncertainty concerning the standard for assessing the adequacy of pleadings." *Id.* at 19a, 24a; see *id.* at 20a ("the Court's explanation contains several, not entirely consistent, signals"). And ultimately, the court of appeals concluded that *Bell Atlantic* did not change much, and had merely intended to adopt a "*flexible* 'plausibility standard.'" *Id.* at 25a (emphasis added).

Moreover, to address the concerns that its "flexible" standard might not adequately protect the interests underlying the qualified-immunity doctrine—particularly in the case of "high-level officials" such as petitioners —the court of appeals resorted to precisely what this

Court deemed inadequate in *Bell Atlantic*. In *Bell Atlantic* this Court admonished that "[i]t is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through 'careful case management.'" 127 S. Ct. at 1967. Yet, in discussing its "flexible" pleading standard, the court of appeals here observed that, "[i]n a case such as this where some of the defendants are current or former senior officials of the Government, against whom broad-ranging allegations of knowledge and personal involvement are easily made, a district court might wish to structure * * * limited discovery" to weed out claims. Pet. App. 26a.

Ultimately, as the court of appeals' application of its "flexible" pleading standard underscores, see Part I.D, *infra*, the court committed the same mistake that the district court had under the now-discredited "no set of facts" pleading-standard regime. That error has exposed petitioners to the burdens of discovery and further litigation if the decision below is not reversed. But even more problematic, as Judge Cabranes observed, "little would prevent other plaintiffs claiming to be aggrieved by national security programs and policies of the federal government from following the blueprint laid out by this lawsuit to require officials charged with protecting our nation from future attacks to submit to prolonged and vexatious discovery processes." *Id.* at 69a-70a. The decision below therefore directly threatens the policies underlying the qualified-immunity doctrine.

### C. In The Case Of Personal-Capacity Claims Against High-Ranking Officials, It Is Particularly Important To Apply The Plausibility Standard Faithfully

*Bell Atlantic* reaffirms that a complaint must establish that the plaintiff's claim for relief is not merely possible but at least plausible. See 127 S. Ct. at 1965-1966. Determining whether a given set of alleged facts is sufficient to state a claim is not possible in the abstract. Rather, such allegations must be considered in the particular context of the specific claims being raised, and thus "context" will affect "the degree of specificity necessary to establish plausibility and fair notice, and therefore the need to include sufficient factual allegations." *Robbins*, 519 F.3d at 1248; see also *Phillips* v. *County of Allegheny*, 515 F.3d 224, 230-232 (3d Cir. 2008) (concluding that "[f]air notice under Rule 8(a)(2) depends on the type of case"); Pet. App. 25a (finding that the standard under *Bell Atlantic* "obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*"). That approach squares with this Court's direction that the qualified-immunity analysis must be "undertaken in light of the specific context of the case." *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001).

In the context of personal-capacity suits against high-ranking government officials, and the concomitant defense of qualified immunity, it is particularly important for courts to ensure that plaintiffs have adequately pleaded the factual grounds for their claims. As courts have observed, such suits "pose a greater likelihood of failures in notice and plausibility because they typically include complex claims against multiple defendants." *Robbins*, 519 F.3d at 1249. Moreover, the further removed a defendant is from the alleged wrongdoing by

others, the more difficult it will be for a plaintiff to plead specific facts that (if true) *plausibly* suggest that the defendant may be liable based on the acts of others.

Because high-ranking officials such as the Attorney General and Director of the FBI ordinarily tend not to be personally involved in the specific actions of lower-level officers down the bureaucratic chain of command, a complaint against such high-ranking officials predicated on allegedly illegal conduct by such lower-level officers will have to allege sufficient facts to make it plausible that the high-ranking officials were in fact personally involved in the alleged illegal conduct. At the same time, absent the requisite subsidiary facts to make such a claim plausible, conclusory allegations that a high-ranking official "knew of" or "condoned" a specific act by a lower-level officer will be inadequate.

Accordingly, to effectuate the purposes of qualified-immunity doctrine, a proper application of the pleading standards articulated by this Court in cases like *Crawford-El* and *Bell Atlantic* must allow a claim of qualified immunity to be overcome at the motion-to-dismiss stage only if the plaintiff provides specific, nonconclusory factual allegations sufficient to plausibly suggest that a high-level government official violated a clearly established right. To pass this threshold, a complaint must cross "the line between *possibility* and plausibility." *Bell Atlantic Corp.*, 127 S. Ct. at 1966 (emphasis added). Just as in *Bell Atlantic*, this does not impose a "'heightened' pleading standard," but rather simply requires that a plaintiff show an "entitlement to relief" that is "plausible," *id.* at 1973 n.14, and recognizes the reality that it will ordinarily be more difficult for a plaintiff to do so when his claim is that the Attorney General of the United States, or another high-ranking official,

should be held legally responsible for the alleged illegal conduct of a lower-level officer.

Moreover, as *Bell Atlantic* underscored, when such facts are absent from a complaint, "[i]t is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through 'careful case management.'" 127 S. Ct. at 1967. That observation is particularly true with respect to claims against high-ranking officials. Cf. *Cheney* v. *United States Dist. Ct.*, 542 U.S. 367, 386 (2004) (noting, in the context of official-capacity suits, that "[a]lthough under Federal Rule of Civil Procedure 11, sanctions are available, and private attorneys also owe an obligation of candor to the judicial tribunal, these safeguards have proved insufficient to discourage the filing of meritless claims against the Executive Branch"). Accordingly, the court of appeals' suggestion here that the purposes of qualified immunity can be adequately protected by trusting the district court to "exercis[e] its discretion to permit some limited and tightly controlled reciprocal discovery so that a defendant may probe for amplification of a plaintiff's claims and a plaintiff may probe such matters as a defendant's knowledge of relevant facts and personal involvement in challenged conduct," Pet. App. 26a, was unfounded.

### D. The Court Of Appeals Erred In Permitting Respondent's Conclusory Allegations Against Petitioners To Vitiate The Qualified Immunity Of Those High-Ranking Officials

Respondent has failed to allege facts sufficient to subject petitioners to the burdens of discovery and further litigation under the principles discussed above.

1. a. Even if true (as they are presumed to be at this stage), respondent's allegations do not show that his right to relief against petitioners was anything more than speculative, or possible, which is not sufficient under the pleading standards discussed above. He alleges that petitioners "approved" a policy of holding suspects deemed to be "of high interest" to the 9/11 investigation in highly restrictive conditions of confinement pending clearance by the FBI, Pet. App. 168a (Compl. ¶ 69), but he does not claim that the policy was itself discriminatory. Rather, he claims that the policy was implemented in a discriminatory fashion by two lower-level FBI officials, who were actually responsible for determining which suspects were "of high interest" to the 9/11 investigation. See *id.* at 164a-165a, 169a (Compl. ¶¶ 51, 76). Thus, respondent alleges only that "[i]n many cases," detainees were classified—by persons other than petitioners—as being "of high interest" because of their race, religion, and national origin, "not because of any evidence of the detainees' involvement in supporting terrorist activity." *Id.* at 164a (Compl. ¶¶ 48-49).

Respondent also alleges that, "within the New York area, all Arab Muslim men arrested on criminal or immigration charges while the FBI was following an investigative lead into the September 11th attacks * * * were immediately classified as 'of interest'" to the investigation. Pet. App. 165a (Compl. ¶ 52). But that allegation (even assuming it is true) says nothing about the decision respondent complains of here: his classification as a detainee "of *high* interest," which resulted in more restrictive conditions on his detention. Moreover, that allegation does not shed light on the treatment of other similarly situated arrestees, and therefore does not support an inference that the alleged policy—which applied

nationwide—was discriminatory on its face. And to the extent that investigators were focused on individuals already within the criminal-justice system in an area in which the attacks were carried out, who bore characteristics similar to the September 11 highjackers, that hardly establishes an invidious discriminatory intent.

b. Respondent's allegations do not suggest that petitioners were personally involved in any discriminatory decision, or that they personally acted with any invidious discriminatory purpose toward respondent. To the contrary, they suggest a *lack* of personal involvement. The complaint alleges that (1) respondents approved a general policy, Pet. App. 168a (Compl. ¶ 69); (2) the general policy was not discriminatory on its face, but rather in application, *id.* at 164a (Compl. ¶¶ 48-49); and (3) other defendants made the individual determinations at issue, *id.* at 164a-165a (Compl. ¶¶ 50-51). Respondent does not allege that either petitioner participated in any classification decision, or that either of them knew which detainees were classified as being "of high interest," or even that either of them established the allegedly discriminatory criteria that were used by subordinate officials. Nor does respondent allege any communications between petitioners and the individuals who are specifically alleged to have made the classification at issue, or that petitioners knew of any particular activities taken by the other defendants as to respondent.

Respondent also makes a few general and broad allegations, devoid of any supporting facts, that petitioners were indirectly involved in discriminatory decisions affecting how he was housed. Respondent calls petitioner Ashcroft a "principal architect" of unwritten policies and says petitioner Mueller was "instrumental" in the "adoption, promulgation, and implementation" of those

unwritten policies. Pet. App. 157a (Compl. ¶¶ 10-11). He further alleges that all of the defendants (including petitioners) "knew of, condoned, and willfully and maliciously agreed to subject [him] to these conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." *Id.* at 172a (Compl. ¶96). But such bare-bones, conclusory allegations are insufficient to survive a motion to dismiss. As *Bell Atlantic* explained: "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do"; rather, a plaintiff's factual allegations must do more than create a suspicion of actionable wrongdoing. 127 S. Ct. at 1964-1965; see also *id.* at 1966 n.5 (allegations must cross "the line between the conclusory and the factual").

All of the alleged conduct here was purportedly committed by officers down the chain of command from petitioners. See Pet. App. 164a-165a (Compl. ¶¶ 50-51). Specifically, respondent alleges that the discriminatory decision to classify him as being "of high interest" was made by Michael Rolince, the former Chief of the FBI's International Terrorism Operations Section, Counterterrorism Division, and Kenneth Maxwell, a former FBI Assistant Special Agent in Charge in the New York Field Office. *Id.* at 164a-165a (Compl. ¶¶ 50-51). Given the complete absence of any "factual matter" (*Bell Atl. Corp.*, 127 S. Ct. at 1965) that plausibly suggests petitioners' direct personal involvement in any discriminatory decision, all that remains are respondent's allegations that petitioners had ultimate supervisory authority over subordinate officials who implemented the confinement policy, as part of their ultimate responsibility for investi-

gating and prosecuting violations of federal criminal law. See Pet. App. 157a, 164a (Compl. ¶¶ 10, 11, 47).[4] But, as explained below (see Part II, *infra*), the mere fact of ultimate supervisory authority over lower-level officials (or a corresponding inference of constructive knowledge) is not an adequate basis for holding petitioners personally liable for alleged wrongdoing, absent facts showing personal involvement.

c. Respondent's general allegations—essentially that the Attorney General and the FBI Director ultimately supervised the investigation into the September 11 attacks, and that many Arab Muslim men were identified as being "of high interest" in connection with that investigation—are fully consistent with lawful behavior on petitioners' part. In *Bell Atlantic*, this Court held that similar, "factually neutral" allegations were inadequate to defeat a motion to dismiss. 127 S. Ct. at 1966 n.5. Instead, a complaint must allege facts sufficient to make an inference of unlawful conduct plausible, not merely possible, and allegations that are fully consistent with lawful behavior do not "raise a right to relief above the

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[4] In distinguishing petitioners from subordinate officers such as Rolince and Maxwell, the key point is that respondent's allegations about petitioners—who are much more highly-ranked—are less specific, more factually neutral, and more conclusory than are his allegations about lower-level employees. Petitioners do not suggest that Rolince and Maxwell are liable, or even that respondent has adequately pleaded claims against them. To the contrary, those officers were making difficult judgments in a massive, constantly evolving international investigation, made more difficult by the uncertain nature and scope of the threat and the national-security interests at stake. Respondent's allegation that his own classification resulted from a discriminatory animus is implausible, particularly when a substantial majority of detainees (578 of 762) were *not* deemed "of high interest" and placed in restrictive terms of confinement. *OIG Report* at 2, 111.

speculative level." See *id.* at 1965. The responsibility to allege sufficient facts to suggest unlawful conduct is particularly important here; petitioners' supervisory responsibilities are not merely consistent with lawful behavior—as was the parallel conduct alleged in *Bell Atlantic*—but are part and parcel of their high offices.

Nor can any inference of illegitimate conduct be drawn from the allegation that "[i]n many cases," detainees who were classified as being "of high interest" were Arab, Muslim, or both. Pet. App. 164a (Compl. ¶ 49). An "invidious discriminatory purpose" is a required element of an equal protection claim. See *Washington* v. *Davis*, 426 U.S. 229, 242 (1976). In the early days of the investigation, the government learned that the attacks had been carried out at the direction of Osama bin Laden, leader of al Qaeda, a fundamentalist Islamist group, motivated by religious extremism. The 19 hijackers were from Arab nations and believed to be Islamic fundamentalists. Given the unprecedented threat the Nation faced in the days, weeks, and months following the September 11 attacks, the overwhelming size of the investigation, the limited information at the government's disposal, and the need to identify those responsible for the atrocities before they could carry out additional attacks, any focus on individuals who had already entered the criminal-justice system in an area where attacks were carried out and who might share the same radical ideology as the attackers would have been a sensible means of limiting the investigation without violating equal-protection guarantees.[5] Accordingly, the

[5] Of course, the qualified-immunity inquiry must be conducted from the perspective of the defendants at the time of the allegedly illegal conduct, and not "with the 20/20 vision of hindsight." *Graham* v. *Connor*, 490 U.S. 386, 396 (1989). In the days, weeks, and months following

bare allegation that those deemed to be "of high interest" to the September 11 investigation were Arab or Muslim men is insufficient on its own to suggest illegal conduct. Cf. *Brosseau* v. *Haugen*, 543 U.S. 194, 198 (2004) (noting that the qualified-immunity inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition") (quoting *Saucier*, 533 U.S. at 201).

Similarly, if petitioners were aware that a high proportion of Arab or Muslim men were among detainees "of high interest," that alone would not have given them cause to believe that the list reflected racial or religious discrimination—any more than would a predominance of Irish suspects in an investigation of the IRA. Thus, just as in *Bell Atlantic*, petitioners had a duty to come forward with sufficient factual allegations suggestive of discriminatory intent on petitioners' part, to "hedge[] against false inferences" drawn from facts that are easily explained by lawful behavior. 127 S. Ct. at 1964.[6]

d. The court of appeals simply assumed that, in light of the importance of the investigation into the September 11 attacks, there was a "likelihood that these senior officials would have concerned themselves with the for-

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September 11, 2001, the Nation—and petitioners—did not know whether or to what extent additional attacks were in the works, adding uncertainty and urgency to the vitally important mission that petitioners undertook in overseeing the investigation into the attacks.

[6] The inference that respondent asks the Court to entertain—that the Attorney General and FBI Director instructed lower-level officials to classify respondent as being of high interest solely on account of his race, religion, or ethnicity—is especially inapposite considering that such direction would have been inconsistent with the Department's own regulations and formal policies, as well as the presumption that government officials comply with such regulations. See *USPS* v. *Gregory*, 534 U.S. 1, 10 (2001).

mulation and implementation of policies" for "high interest" suspects, and therefore it followed that petitioners "condoned and agreed to the discrimination that the Plaintiff alleges." Pet. App. 62a; see also *id.* at 43a ("[I]t is plausible to believe that senior officials of the Department of Justice would be aware of policies concerning the detention of those arrested by federal officers in the New York City area in the aftermath of 9/11 and would know about, condone, or otherwise have personal involvement in the implementation of those policies."). But such speculation is not sufficient to state—or attempt to salvage—a personal-capacity claim.

As discussed, to survive a motion to dismiss, the allegations of the complaint must state a plausible, not merely possible, entitlement to relief. See *Bell Atl. Corp.*, 127 S. Ct. at 1966. That means, as *Bell Atlantic* illustrates, that it is not enough for a plaintiff to show that unlawful conduct was simply "among the realm of 'plausible' possibilities." *Id.* at 1963. A contrary approach would reestablish the very practice rejected by this Court in *Bell Atlantic* of allowing "a wholly conclusory statement of claim" to survive a motion to dismiss based on the mere "possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." *Id.* at 1968 (brackets in original).

This case illustrates the hazards of such speculation. As the district court noted, the investigation was nothing short of "massive." Pet. App. 76a n.4. "Within 3 days [of September 11, 2001], more than 4,000 FBI Special Agents and 3,000 support personnel were assigned to work on the investigation," and "[b]y September 18, 2001, the FBI had received more than 96,000 leads from the public." *Ibid.* Given the unprecedented size of the investigation, there is every reason to assume that the

Attorney General and the Director of the FBI did *not* personally do more than—as respondent specifically alleges—approve a general policy of using highly restrictive confinement for any detainee "of high interest" until it could be established that he was not connected with terrorist activities. Indeed, it is highly *im*plausible to think that—particularly when faced with a national-security crisis on the level of the September 11 attacks—the Attorney General and the FBI Director were involved in the granular decisions about which respondent complains. The court of appeals' contrary assumption not only lacks common sense, but contravenes the longstanding presumption of regularity accorded decisions by government officials. See *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926).

Accordingly, because respondent has failed to "put forward *specific, nonconclusory* factual allegations" of unlawful conduct on petitioners' part, *Crawford-El*, 523 U.S. at 598 (emphasis added), and the factual allegations in the complaint that are directed to petitioners do not show an entitlement to relief against petitioners that is anything more than speculative, the courts below should have granted petitioners' motion to dismiss.

2. In holding otherwise, the court of appeals invoked *Crawford-El* and *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506 (2002). Pet. App. 61a-62a. But those cases lend no weight to the conclusion that an allegation of culpable mens rea, unsubstantiated by any predicate facts about the conduct that is the alleged basis for liability, is enough to defeat summary disposition. If anything, they highlight the deficiencies in respondent's complaint. See *Bell Atl. Corp.*, 127 S. Ct. at 1965-1966 (noting that "prior rulings and considered views of leading commen-

tators" are useful in identifying facts that are suggestive enough to demonstrate illegal conduct).

In both *Crawford-El* and *Swierkiewicz*, the complaints provided clear notice to the defendant of the specific conduct alleged to give rise to liability (*i.e.*, the who, what, and when of the alleged wrongdoing). In *Crawford-El*, the plaintiff prisoner alleged that the defendant corrections officer had deliberately misdelivered his box of personal belongings by asking his relative to pick them up rather than ship them to his next destination, and that she had done so in retaliation for the plaintiff's participation in unfavorable press reporting about the prison. See 523 U.S. at 578-579. The plaintiff also alleged that the defendant had made specific statements about the plaintiff that revealed a retaliatory motivation. See *id.* at 579 n.1.

Similarly, in *Swierkiewicz*, the plaintiff alleged that he was demoted by his employer's Chief Executive Officer (CEO) and that the bulk of his former duties were transferred to a younger employee; that the CEO later said he wanted to "energize" his department and appointed the younger and less-qualified employee to the plaintiff's prior position; and that, following his demotion, the plaintiff was isolated by his supervisor and excluded from business decisions. See 534 U.S. at 508-509. After outlining those grievances, the plaintiff was given the choice of resigning without a severance package and, when he refused to do so, was fired. See *id.* at 509. The complaint "detailed the events leading to [the plaintiff's] termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination." *Id.* at 514.

Thus, the only issue before this Court in both cases was the showing of discriminatory motive necessary to

defeat summary disposition of the claims. See *Crawford-El*, 523 U.S. at 577-578; *Swierkiewicz*, 534 U.S. at 513-514; see also Fed. R. Civ. P. 9(b) (requiring that fraud or mistake must be pleaded with particularity but that "[m]alice, intent, knowledge, and other condition of a person's mind may be alleged generally"). Although this Court rejected heightened pleading standards applied by the courts of appeals in both cases, it nevertheless insisted on the "firm application of the Federal Rules of Civil Procedure" to "protect[] the substance of the qualified immunity defense." *Crawford-El*, 523 U.S. at 597 (internal quotation marks omitted).

Here, in sharp contrast to *Crawford-El* and *Swierkiewicz*, respondent's allegations do not identify any specific conduct alleged to be the basis for petitioners' individual liability. Respondent does not allege the *what* of liability (*i.e.*, any particular steps that the Attorney General or FBI Director took to approve, condone, or ratify the discriminatory selection of respondent as a "high interest" detainee). Respondent does not allege *when* this conduct allegedly took place, *who* was allegedly involved, or *where* it allegedly occurred. And respondent does not allege a factual basis for inferring that petitioners' allegedly culpable states of mind were the proximate cause of the allegedly discriminatory selection—by lower-level officials—of respondent as a detainee "of high interest" to the September 11 investigation. Cf. *Bell Atlantic*, 127 S. Ct. at 1971 n.10 (complaint could not satisfy Rule 8's notice requirements because it made no mention of any "specific time, place, or person involved in the alleged conspiracies").[7]

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[7] This Court's per curiam decision in *Erickson* v. *Pardus*, 127 S. Ct. 2197 (2007), is also distinguishable. That case involved Section 1983

3. Adherence to the pleading standards established by this Court's decision is particularly important in the context of this suit against high-level government officials who "were trying to cope with a national and international security emergency unprecedented in the history of the American Republic." Pet. App. 69a (Cabranes, J., concurring). The basic concern this Court expressed in *Bell Atlantic*—that permitting thinly pleaded complaints to survive motions to dismiss might unnecessarily impose "enormous" discovery expenses, see 127 S. Ct. at 1967—applies even more forcefully in this context. As Judge Cabranes recognized, "discovery would not only result in significant cost but would also deplete the time and effectiveness of current officials and the personal resources of former officials." Pet. App. 70a n.1. Similarly, petitioners' status as especially high-level officials is material, because such officials "require greater protection than those with less complex discretionary responsibilities." *Harlow*, 457 U.S. at 807.

There can be no doubt about the burdens that personal-capacity lawsuits visit upon high-level officials such as the Attorney General, even long after their tenures in office end. As Bennett Boskey recently ex-

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claims against prison officials. The Court held that a pro se prisoner's claims based on inadequate medical treatment were sufficient to survive a motion to dismiss because the complaint specifically alleged that the prison doctor's "decision to remove petitioner from his prescribed hepatitis C medication was 'endangering [his] life,'" that the "medication was withheld 'shortly after' [the plaintiff] had commenced a treatment program that would take one year," that the plaintiff "was 'still in need of treatment for this disease,' and that the prison officials were in the meantime refusing to provide treatment." 127 S. Ct. at 2200 (citation omitted). Respondent's allegations against petitioners here are wholly lacking in such factual details.

plained, Attorney General Edward Levi—who held the office for 24 months—was confronted by a

> mass of litigation that sought to obtain money judgments from [him] in his individual capacity. At the time he completed his service as Attorney General at the end of the Ford Administration, there were just over 30 suits then pending against him in his individual capacity. They all needed attention * * * . It took about eight more years before the last of them was cleaned up. No judgment was ever entered against [him] personally; no case reached a stage where he was required to testify * * * . What he did have was this long aggravation so undeserved.

Bennett Boskey, ed., *Some Joys of Lawyering* 114 (2007). Individual-capacity claims against high-ranking government officials have not become less prevalent or burdensome since Attorney General Levi's tenure.

As Judge Cabranes noted, "a detached observer may wonder whether the balance struck [by the court of appeals] between the need to deter unlawful conduct and the dangers of exposing public officials to burdensome litigation * * * jeopardizes the important policy interest Justice Stevens aptly described as 'a national interest in enabling Cabinet officers with responsibilities in [the national security] area to perform their sensitive duties with decisiveness and without potentially ruinous hesitation.'" Pet. App. 70a (quoting *Mitchell*, 472 U.S. at 511 (concurring in the judgment)) (second alteration by Judge Cabranes). Judge Cabranes believed that he was constrained to reach that unsettling result under the court's interpretation of this Court's precedents, which he found to be "less than crystal clear," and which he urged this Court to revisit "at the earliest opportu-

nity." *Id.* at 68a. This Court should clarify its case law in this critically important area and hold that, based on the conclusory allegations made against petitioners in this case, the balance is properly struck in favor of the interests underlying the qualified-immunity doctrine.

## II. HIGH-RANKING FEDERAL OFFICIALS MAY NOT BE HELD LIABLE UNDER *BIVENS* BASED SOLELY ON A CONSTRUCTIVE-NOTICE THEORY

The courts of appeals' decision in this case is erroneous for an alternative and perhaps even more fundamental reason. Because of the absence of any factual allegations plausibly suggesting petitioners' involvement in the alleged actions of lower-level officers who purportedly violated respondent's rights, the only way in which this action could proceed against petitioners is on a theory of constructive notice or supervisory liability that is incompatible with *Bivens* and this Court's precedents.

### A. This Court Has Limited The Scope Of *Bivens* Remedies

This Court held in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), that the Constitution vests federal courts with authority to recognize an implied cause of action for damages against federal officials who have deliberately engaged in unconstitutional conduct. The Court has described the purpose of the *Bivens* damages remedy as twofold: first, to provide victims of constitutional violations with relief in circumstances where there are no other effective remedies; second, to deter individual officers from committing constitutional violations. See *Davis* v. *Passman*, 442 U.S. 228, 245-246 (1979); *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 71 (2001).

Although this Court has referred to *Bivens* as "the federal analog to suits brought against state officials

under" Section 1983, *Hartman* v. *Moore*, 547 U.S. 250, 254 n.2 (2006), determining the scope of the constitutional *Bivens* remedy is necessarily different from determining the scope of Section 1983. The latter is primarily an exercise in statutory interpretation, while the former requires the Court to make a policy determination traditionally reserved to a legislature. See *Bush* v. *Lucas*, 462 U.S. 367, 376 (1983); see also *Wilkie* v. *Robbins*, 127 S. Ct. 2588, 2597 (2007).

Thus, this Court has "responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988). And the Court has stressed that, before "'authorizing a new kind of federal litigation'" under *Bivens*, the Court should consider whether "any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages" or whether there are "'any special factors counselling hesitation.'" *Wilkie*, 127 S. Ct. at 2598 (quoting *Bush*, 462 U.S. at 378); see *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 773 (2008) ("Concerns with the judicial creation of a private cause of action counsel against its expansion.").

Because *Bivens* "is concerned solely with deterring the unconstitutional acts of individual officers" and not with "deterring the conduct of a policymaking entity," *Correctional Servs. Corp.*, 534 U.S. at 71, this Court has repeatedly refused to extend its judge-made remedy to suits against anyone other than the individual officers responsible for the alleged constitutional violation. In *FDIC* v. *Meyer*, 510 U.S. 471 (1994), the Court categorically barred *Bivens* suits against federal agencies—even where they are otherwise amenable to suit because Con-

gress has waived sovereign immunity. *Id.* at 484. It emphasized that "the logic of *Bivens*" contemplates only a limited action against individuals, not against federal agencies. *Id.* at 484-485. Similarly, in *Correctional Services*, the Court held that *Bivens* suits could not be brought against private entities. See 534 U.S. at 66-74.

### B. Any Supervisory Liability Permitted Under *Bivens* Must Be Strictly Limited

1. As explained above, the cause of action in *Bivens* was inferred to provide a limited remedy against the individuals directly responsible for a constitutional deprivation. The logic of *Bivens* thus permits high-level federal officials to be held liable only for their direct involvement in constitutional violations, or (at most) their deliberate indifference in the face of information that the rights of others are being violated. That understanding is consistent with the long-standing principle that a government official may be held liable only for his own culpable actions, and not under a theory of *respondeat superior* or vicarious liability. See *Dunlop* v. *Munroe*, 11 U.S. (7 Cranch) 242, 269 (1812); see also *Robertson* v. *Sichel*, 127 U.S. 507, 515-516 (1888) ("A public officer or agent is not responsible for the misfeasances or positive wrongs, or for the nonfeasances, or negligences, or omissions of duty, of the subagents or servants or other persons properly employed by or under him, in the discharge of his official duties.").

The Second Circuit has adopted a far broader standard for supervisory liability that, as applied here, expands the *Bivens* remedy well beyond its necessarily limited scope. The Second Circuit's standard permits a supervisor to be held personally liable under Section 1983 or *Bivens* not only for the supervisor's direct par-

ticipation in constitutional violations or deliberate indifference to knowledge of wrongdoing, but also for merely constructive knowledge of a risk of wrongdoing by subordinate officers. See Pet. App. 14a (holding that a supervisor may be liable for "creat[ing] a policy or custom under which the violation occurred," or being "grossly negligent in supervising subordinates who committed the violation"); accord, *e.g.*, *Poe* v. *Leonard*, 282 F.3d 123, 141-142 (2d Cir. 2002); *Black* v. *Coughlin*, 76 F.3d 72, 74 (2d Cir. 1996); *Meriwether* v. *Coughlin*, 879 F.2d 1037, 1048 (2d Cir. 1989); *McKinnon* v. *Patterson*, 568 F.2d 930, 934 (2d Cir. 1977), cert. denied, 434 U.S. 1087 (1978).[8] Thus, the court of appeals held here that the Attorney General and the FBI Director could be held liable without any allegations that could support a finding of actual knowledge of or even deliberate indifference to unconstitutional conduct by subordinates.

That broad notion of supervisory liability would expand the *Bivens* remedy far beyond its intended purposes. Imposing liability on a supervisory official who lacks actual knowledge of wrongdoing is an ineffective

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[8] The court of appeals' extension of liability to situations where a supervisory official "created a policy or custom under which the violation occurred" (Pet. App. 14a) is uncertain in scope. It arguably extends liability to supervisors who create a policy or custom that is consistent with the Constitution, if it is applied in an unconstitutional manner by some at the operational level of government. Such a rule would extend supervisory liability far beyond situations where a custom and practice has become "so permanent and well settled" as to have the force of law. *Monell* v. *Department of Soc. Servs.*, 436 U.S. 658, 690-691 (1978) (quoting *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 168 (1970)). The Second Circuit has, however, recognized that, in order to overcome a supervisor's qualified immunity, a plaintiff must show that both "the law violated by [the subordinate] and the supervisory liability doctrine * * * were clearly established." *Poe*, 282 F.3d at 134.

means of deterring official misconduct by subordinates. The "core premise" of *Bivens* is "the deterrence of individual officers who commit unconstitutional acts." *Correctional Servs. Corp.*, 534 U.S. at 71. As this Court recognized, the purposes of *Bivens* are fulfilled by deterring those who are directly responsible for the unconstitutional conduct, even if expanding liability further might discourage harm. See *ibid*. Moreover, *Bivens* has never been intended to function as a management tool to weed out negligent supervisors.

Furthermore, there are special factors counselling hesitation against extending *Bivens* to impose supervisory liability. It would take little effort for a plaintiff to subject high-level government supervisors—including even Cabinet-level officials and heads of agencies—to time-consuming lawsuits by making bare allegations of constructive knowledge based solely on supervisory authority and without supporting facts. Officials like the Attorney General and the Director of the FBI have ultimate supervisory authority over thousands of subordinates in numerous components through multiple levels of bureaucracy—deputies, assistants, bureau chiefs, office heads, and so on. At the time of respondent's detention, the Department of Justice included the litigating divisions and United States Attorneys offices, the FBI, the Drug Enforcement Administration, the Immigration and Naturalization Service, the United States Marshal's Service, the United States Trustees, the Bureau of Prisons, and others. Plainly, it is impossible for high-ranking officials to examine every operational decision made at every level of bureaucracy. Cf. *Parish* v. *United States*, 100 U.S. 500, 504 (1879). Thus, under any sensible scheme, supervisory officials must be permitted to rely on the good judgment of their subordinates.

Just as this Court accords a general presumption of regularity to actions of government officials, see *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996), so too should supervisors be able to presume their subordinates act in accordance with law. The presumption of regularity specifically applies in judicial review of the exercise of supervisory responsibility by high-level government officials. "[I]n the absence of clear evidence to the contrary, courts presume that [public officials] have properly discharged their official duties." *Chemical Found.*, 272 U.S. at 14-15. This Court has been especially reluctant to "lightly discard" the presumption that there is a legitimate basis for government action where there is a risk of "judicial intrusion into executive discretion of [a] high order." *Hartman*, 547 U.S. at 263. The actions taken by the heads of the largest federal law-enforcement agencies in response to a coordinated terrorist attack on American soil undoubtedly reflect executive discretion of a very high order.

Finally, requiring high-level officials to face personal liability based on merely constructive knowledge of wrongdoing at the operational level would almost certainly "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, C.J.), cert. denied, 339 U.S. 949 (1950). Exposing such high-level government officials to liability based on the constitutional violations of lower-level agency employees would greatly exacerbate the "substantial social costs" of extending liability to supervisory government officials, "including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson* v. *Creighton*, 483 U.S. 635, 638 (1987).

2. In the context of Section 1983 suits, this Court has already foreclosed the imposition of Section 1983 liability on individual government officials on the basis that they had "constructive notice" of wrongdoing committed by third parties. See *Rizzo* v. *Goode*, 423 U.S. 362 (1976). Although Section 1983 and *Bivens* differ in their substantive scope,[9] there is no reason for this Court to reach any different conclusion under *Bivens*. Indeed, because of the special considerations counselling reluctance in expanding the judge-made *Bivens* remedy, the limitation of liability that the Court has adopted for Section 1983 should apply *a fortiori* to *Bivens* cases.

In *Rizzo*, the Court reversed a grant of injunctive relief under Section 1983 against the mayor, the city manager, the police commissioner, and other police supervisors in Philadelphia. It concluded that there could be no supervisory liability under Section 1983 when "unconstitutional exercises of police power" had been committed by individual police officers rather than their supervisors and "there was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by [the supervisors]—express or otherwise—showing their authorization or approval of such misconduct." 423 U.S. at 371, 377. Although administrators may be liable when they deny rights "by their *own* conduct," that was not

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[9] While this Court has generally treated immunity under Section 1983 and *Bivens* in parallel, see, *e.g.*, *Harlow*, 457 U.S. at 818 n.30 (quoting *Butz*, 438 U.S. at 504), it has also recognized that the substantive scope of suits under those provisions may differ in some respects. Thus, for example, while municipalities that employ persons who commit constitutional violations may be held liable under Section 1983, see *Monell*, 436 U.S. at 690-691, *Bivens* actions against federal agencies are categorically barred, see *FDIC* v. *Meyer*, 510 U.S. at 485.

the case in *Rizzo*, the Court held, because "the responsible authorities had played no affirmative part" in violating constitutional rights. *Id.* at 377.

The general restraint that this Court traditionally exercises in interpreting the scope of the *Bivens* cause of action (see, *e.g.*, *Wilkie*, *supra*) calls at a minimum for adopting a standard of secondary liability that is at least as rigorous as the one that this Court has long applied in the Section 1983 context. And, indeed, in *Farmer* v. *Brennan*, 511 U.S. 825 (1994), the Court held that a supervisory-level prison official can be held liable for dangerous prison conditions alleged to violate the Eighth Amendment only if the supervisor "knows of and disregards an excessive risk to inmate health or safety." *Id.* at 837-838. In adopting that requirement of subjective knowledge as the predicate for "deliberate indifference," the Court distinguished individual defendants from corporate municipalities, for which an objective standard of knowledge is more appropriate. See *id.* at 841-842.

The Court has also followed a liability-limiting approach in Section 1983 actions against municipalities. There, the Court has held that liability attaches only "when it can be fairly said that the city itself is the wrongdoer," *Collins* v. *City of Harker Heights*, 503 U.S. 115, 122 (1992), and not based on a theory of *respondeat superior* or vicarious liability. See *City of Canton* v. *Harris*, 489 U.S. 378, 386-387 (1989). Where a plaintiff seeks to hold a municipality liable for constitutional torts committed by its agents, the plaintiff must "demonstrate that, through its *deliberate* conduct, the municipality was the 'moving force' behind the injury alleged." *Board of the County Comm'rs* v. *Brown*, 520 U.S. 397, 404 (1997); see also *id.* at 405 (explaining that "rigorous standards of culpability and causation must be applied").

Liability may not be imposed based on "simple or even heightened negligence," but instead requires a showing that the municipality itself manifested "deliberate indifference to the risk that a violation of a particular constitutional or statutory right" might occur. *Id.* at 407, 411. The plaintiff must also establish "a direct causal link" between the municipality's culpable conduct "and the alleged constitutional deprivation." *Harris*, 489 U.S. at 385.

There is no reason to treat high-level federal officials like the Attorney General or the Director of the FBI sued in their personal capacity under *Bivens* any less favorably than a municipality sued under Section 1983. In both instances, the rationale for imposing liability is similar, as is the rule that liability must be predicated on the defendant's own culpable conduct rather than vicarious liability or *respondeat superior*.

### C. The Court Of Appeals Erred In Permitting This Suit To Proceed Against Petitioners Based On Allegations Amounting To No More Than Constructive Notice

As applied to the allegations in this case, the proper standard for supervisory liability would preclude liability unless petitioners had actual knowledge of the assertedly discriminatory nature of the classification of suspects as being "of high interest" and they were deliberately indifferent to that discrimination. See *Farmer*, 511 U.S. at 837-838; *Brown*, 520 U.S. at 414. Respondent's allegations plainly could not meet that standard, as the complaint is completely devoid of any non-conclusory factual allegation suggesting that petitioners knew about the allegedly discriminatory acts of lower-

level FBI officials.[10] Furthermore, respondent's factual allegations do not show any causal relationship between any of petitioners' own conduct and respondent's designation as a detainee "of high interest."

As explained above, respondent's allegations do not suggest petitioners' personal involvement in any discriminatory decision. Respondent likewise makes no factual allegations suggesting petitioners knew about any discriminatory decisions made by subordinates: There is no allegation that either petitioner had any communications with the lower-level officials who allegedly made the classification at issue (Rolince and Maxwell), or that petitioners knew of any particular activities taken by the other defendants as to respondent.

Nevertheless, despite the total lack of any nonconclusory factual allegation supporting the personal and direct involvement of petitioners in any discriminatory action, the court of appeals reasoned that petitioners could be held personally responsible "for the actions of their subordinates under the standards of supervisory liability outlined" in the court's opinion. Pet. App. 62a;

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[10] Respondent contended at the certiorari stage (Br. in Opp. 24, 25) that the question of constructive knowledge "has not yet arisen" in this case because his "allegation that petitioners had actual knowledge of their subordinates' unconstitutional conduct is accepted as true" at the pleading stage. If the Court concludes (as it should) that respondent's conclusory allegations of petitioners' actual knowledge are inadequate, without any supporting factual matter, to entitle him to proceed to discovery, then his only other apparent ground for proceeding against petitioners under the reasoning of the court of appeals would be by virtue of constructive knowledge inferred from "the likelihood that these senior officials would have concerned themselves with the formulation and implementation of policies dealing with the confinement of those arrested on federal charges in the New York City area and designated 'of high interest' in the aftermath of 9/11." Pet. App. 62a.

see also *id.* at 14a-15a (holding that supervisor may be held liable for creating a custom or policy under which a violation takes place or for gross negligence in supervising subordinates who commit constitutional violations). That error alone provides a sufficient basis for reversing the decision below and instructing that the claims against petitioners be dismissed.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed, and the case should be remanded with instructions to dismiss the remaining claims against petitioners.

Respectfully submitted.

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